Implementing the Regulatory Flexibility Act

Background

- The Regulatory Flexibility Act (5 U.S.C. 601–612) requires Federal agencies to—
  - Consider the impact of regulatory changes on small business concerns;
  - Analyze alternatives that may minimize the impact on small business concerns; and
  - Make the analyses available for public comment.

Background (cont'd)

- The Regulatory Flexibility Act applies to rules for which an agency publishes a general notice of proposed rulemaking under the Administrative Procedures Act (5 U.S.C. 553).
- The DoD Office of General Counsel has determined that, since DFARS rules are published under the authority of the OFPP Act (41 U.S.C. 1707), the Regulatory Flexibility Act does not apply to DFARS rules.
- DoD follows the requirements of the Regulatory Flexibility Act to the maximum extent practicable as a matter of policy.

Requirement

- We must assess each FAR and DFARS rule that is published for public comment to determine if the rule may have a significant economic impact on a substantial number of small entities.

Examples of a Significant Economic Impact

- Preference Status
  - Diminishment of any preference status provided to small businesses in the FAR/DFARS, including those in Part 19 (Small Business Programs) and Part 13 (Simplified Acquisition Procedures).

- Solicitation Procedures
  - Revision of competitive solicitation procedures, or methods of providing notice of proposed acquisitions, in a manner likely to result in a reduction in small business participation by 5% or more.

Examples of a Significant Economic Impact (cont'd)

- Simplified Acquisition Procedures
  - Substantive revision of simplified acquisition procedures.
- Costs to Unsuccessful Offerors
  - Imposition of additional costs on unsuccessful offerors who might, for example, be required to purchase special equipment in order to enter the Government marketplace and qualify for award.

Examples of a Significant Economic Impact (cont'd)

- Competitive Posture
  - Imposition of compliance costs that are disproportionately higher for small businesses than for large businesses, such that the competitive posture of small businesses in obtaining the award of Government contracts will be adversely affected.
- Professional Skill Requirements
  - Requiring recurring application of professional or expert skills that are not normally available in-house to small businesses, the costs of which are not subject to being passed along to the Government as part of the contract price.

Examples of a Significant Economic Impact (cont'd)

- Nonreimbursed Administrative Costs
  - Imposition of significant administrative costs (e.g., recordkeeping or reporting costs) that are not subject to being passed along to the Government as part of the contract price.

- Business Systems
  - Imposition of requirements that vary significantly from generally accepted business practices, thereby requiring revision of bookkeeping, accounting, or other information collection systems.

Examples of a Significant Economic Impact (cont'd)

- Significant Positive Impact
  - Providing a significant benefit to small entities.

Defining "Substantial Number" of Small Entities

- As a general rule, a FAR/DFARS change is considered to affect a substantial number of small entities if the change will--
  - Impact 20 percent or more of small businesses contracting with the Government in the major supply, service, or construction field to which the rule relates; or
  - Impose a severe hardship on even a few small businesses.

Requirement

- If the rule MAY have a significant economic impact on a substantial number of small entities, prepare—
  - An initial regulatory flexibility analysis before issuing the proposed or interim rule; and
  - A final regulatory analysis before issuing the final rule.
- Summarize the analysis in the corresponding Federal Register notice.

Requirement

- If the rule will definitely NOT impact U.S. small business entities (e.g., only affects foreign companies, or excludes application to small business), include in the Federal Register notice—
  - For the proposed or interim rule, a statement to that effect, with factual supporting rationale.
  - For the final rule, a statement certifying with factual supporting rationale.

Requirement

- If the rule does not require publication for public comment (i.e., publishing final rule without prior proposed or interim rule), Regulatory Flexibility Act does not apply.

  No IRFA/FRFA or certification required.

- See FAR Operating Guide. Appendix 4 (for templates) and Appendix 8.

Initial Regulatory Flexibility Analysis - Contents

- A description of the reasons why the action is being considered.
- A statement of the objectives and the legal basis for the rule.
- A description of and, where feasible, an estimate of the number of small entities to which the rule will apply.

Initial Regulatory Flexibility Analysis – Contents (cont'd)

- A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
- An identification of all relevant Federal rules that may duplicate, overlap, or conflict with the rule.

Initial Regulatory Flexibility Analysis – Contents (cont'd)

- A description of any significant alternatives to the rule that would accomplish the stated objectives of applicable statutes and that would minimize any significant impact of the rule on small entities.

Final Regulatory Flexibility Analysis - Contents

- A statement of the need for, and the objectives of, the rule.

- A summary of the significant issued raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of such issues, and a statement of any changes made to the proposed/interim rule as a result of such comments.

Final Regulatory Flexibility Analysis - Contents

- The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule, and a detailed statement of any change made in the final rule as a result of the comments.

Final Regulatory Flexibility Analysis – Contents (cont'd)

- A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

- A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

Final Regulatory Flexibility Analysis – Contents (cont'd)

- A description of the steps taken to minimize the significant economic impact of the rule on small entities consistent with the stated objectives of applicable statutes, including—
  - A statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule; and
  - Why each one of the other considered significant alternatives, that affect the impact on small entities, was rejected.

Team Responsibilities

- In drafting the rule, consider the impact on small entities.
- Consider alternatives that will minimize economic impact.
- Consider a tiered approach.

Additional Information

- Additional information and samples are available at:

FAR Operating Guide – Appendix 4 and Appendix 8